



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of :
Bruce A. Rogers, et al. :
Application No.: 10/763,846 : Group Art Unit: 3732
Filed: January 23, 2004 : Examiner: R.A. Running
For: ADJUSTABLE HAIR HOLDING :
DEVICE :
Atty. Docket No.: ROG030.10003 :

I, John F. Letchford, Registration No. 33,328, certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on August 13, 2008.

John F. Letchford

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

APPELLANTS' BRIEF PURSUANT TO 37 CFR §§ 41.31 and 41.37

The above-identified application comes before the United States Patent and Trademark Office ("USPTO") Board of Appeals and Interferences ("Board") from a Second Rejection of claims 1, 3-6 and 9 dated May 28, 2008.

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I. REAL PARTY IN INTEREST

The real party in interest in the present appeal is Bruce A. Rogers, 325 S. Camac St., #3F, Philadelphia, PA 19107, USA,

as evidenced by an assignment of the entire right, title and interest in and to the application from the co-inventor, David Livingston, to Mr. Rogers, which is recorded in the USPTO at reel 015084 and frame 0309.

II. RELATED APPEALS AND INTERFERENCES

Substantially concurrently herewith, Appellants have filed or will file an appeal in United States Patent Application No. 10/764,237 which may directly affect or be directly affected by or may have a bearing on the Board's decision in the presently pending appeal.

III. STATUS OF THE CLAIMS

The status of the claims in the application is as follows:

Claim 2 has been canceled. Claims 7 and 8 have been withdrawn from consideration. Claims 1, 3-6 and 9 remain in the application and have been twice rejected in identical form.

IV. STATUS OF AMENDMENTS FILED SUBSEQUENT TO THE FINAL REJECTION

No amendments were filed subsequent to the Final Rejection. Appellants note that the "Final Rejection" in the instant application occurred on October 29, 2007. Subsequent thereto, specifically on December 18, 2007, Appellants submitted a Submission After Final Action Pursuant to 37 CFR § 1.116(e) ("SAFA") in part to introduce the 37 CFR § 1.132 expert declarations of Ms. Rommy Revson and Ms. Mary Lafauci in support of patentability. The SAFA was dismissed by the Examiner by Advisory Action dated January 29, 2008, alleging that Appellants had "fail[ed] to provide a good and sufficient reasons (sic) why

[the Declarations were] necessary and [were] not earlier presented." Appellants sincerely believe that they offered such "good and sufficient reasons" and invite the reviewing members of the Board to revisit the SAFA and consider those reasons.

That notwithstanding, the Examiner's refusal to consider the Declarations of Ms. Revson and Ms. Lafauci left Appellants with no practical choice but to continue prosecution of the present application through the Requested for Continued Examination (RCE) provisions of 37 CFR § 1.114 which they did so by way of filing an RCE application on February 22, 2008 to assure that Ms. Revson's and Ms. Lafauci's Declarations would be considered and made of record. Upon filing of the RCE, the Examiner considered but wrongly dismissed the Revson and Lafauci declarations for reasons discussed below.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

Most broadly, the invention defined in the claims on appeal is addressed to a hair holding device in which a first body member and a second body member are hingedly connected and are operable to grippingly engage a quantity of gathered hair strands. The claims on appeal include one (1) independent claim, claim 1.

The apparatus recited in independent claim 1 on appeal involves (with reference to specification page and line numbers and drawing reference characters, where available, in parentheses):

a first body member and a second body member (specification at page 16, line 16 through page 20, line 34; drawing ref. nos. 312, 314), said first and second body members comprising hair

gripping portions (specification at page 16, lines 25-27; drawing ref. nos. 322, 324) adapted to be squeezed by a user whereby said hair gripping portions come into contact with gathered strands of a user's hair;

hinge means (specification at page 16, lines 20-25) for pivotally connecting said first and second body members; and

adjustment means comprising a non-slip friction mechanism coaxially arranged with respect to said hinge means (specification at page 16, line 16 through page 20, line 34; drawing ref. no. 136 and drawing ref. nos. 360, et seq.) for causing said hair gripping portions to remain at a point at which said hair gripping portions are squeezed together by a user.

Claims 3-6 and 9 on appeal further enlarge upon the structure of the hair holding device of claim 1 to define various features which are believed to be representative of preferred aspects thereof.

Presently existing hair holding device assume a wide variety of configurations. Several of these designs were discussed at length in the specification of the present application as well as during prosecution thereof. Regardless of their individual constructions, indeed, because of their structural peculiarities, none of these devices, including the hair holding devices and other apparatus disclosed in the references cited against the claims on appeal, is capable of producing the advantages afforded by the claimed invention now before the Board.

VI. GROUNDS OF OBJECTION/REJECTION TO BE REVIEWED ON APPEAL

A statement of each separate ground of objection or rejection Appellant wishes to be reviewed, including the basis of each ground of rejection is as follows:

(1) Claims 1 and 3-6 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Wilde (U.S. Patent No. 870,330).

(2) Claims 1, 3-5 and 9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Sheehan (U.S. Patent No. 3,546,750).

VII. ARGUMENT

(1) Rejection of Claims 1 and 3-6 under
35 U.S.C. § 102(b) as being anticipated by Wilde

Claims 1 and 3-6 stand twice rejected under 35 U.S.C. § 102(b) as being anticipated by Wilde. Such rejection is respectfully traversed.

In regard to Wilde, Appellants initially note -- as they have in the past -- that the Wilde device is an ear ring. It is not a hair holding device. As explained below, it would be essentially useless in holding a lock or shock of hair.

Simple inspection of FIGS. 1 and 5 of the Wilde patent reveals that the opposed convex "dished ends" 7 and 11 of spring frame "a" and clamping member "b", which together apply clamping force to retain the ear ring on a user's ear, present very small cooperative clamping surface areas, i.e., areas sufficient to clamp a user's ear lobe. Even assuming such surfaces were as large as those shown in FIG. 5 of Wilde (which they very likely would not be in practical use), and if they were attempted to be

used to clamp a wearer's hair, they would clamp little more than a few strands of hair at the centralmost portions of the clamping surfaces. As a result, even if somehow adapted to a hair holding device, such a clamping arrangement would very likely quickly become disengaged from and fall from the user's hair.

Moreover, the hair holding device of Appellants' claim 1 specifically calls for hair gripping portions as being part of the first and second body members. The Examiner's statement of rejection in reliance upon Wilde is -- as it has always been -- conspicuously silent regarding the presence of any *hair gripping portions* in the Wilde device. As such, the ear ring taught by Wilde does not anticipate the invention defined in Appellants' claim 1.

Furthermore, Appellants kindly submit that it would be legally improper hindsight to assert that it would have been obvious at the time of Appellants' invention to adapt the teachings of Wilde to hair holding device technology to produce a hair holding device having a non-slip friction adjustment means as prescribed in Appellants' claim 1. In this regard, the Examiner will note that the Wilde patent issued in 1907. In the 100 years since, as reflected not only the Wilde patent but also in the other references cited by the Examiner as being of interest, none have proposed the use of a slip friction adjustment means outside of the ear ring art. In other words, inventors have had a century since issuance of the Wilde patent to conceive of a hair holding device including a non-slip friction adjustment means. None have done so. This fact is

compelling testament to the non-obviousness of Appellants' invention.

In the final complete sentence of page 2 of the May 28, 2008 Office Action the Examiner states: "the adjustment means [of Wilde] comprises a non-slip friction mechanism." And, in the sentence bridging pages 2 and 3 of that Office action, she elaborates on what she considers to be that "non-slip friction mechanism."

Appellants believe this would be an opportune time to reacquaint the Examiner and remind the Board with what, specifically, Appellants mean when they refer to "slip friction mechanisms" and "non-slip friction mechanism" when discussing such a critical feature of the present invention.

Claim 1 prescribes an adjustment means "comprising a non-slip friction mechanism." The Examiner asserts: "The adjustment means [of Wilde] comprises a non-slip friction adjustment mechanism." Appellants ask: where is this shown or described in Wilde? The Wilde ear ring can be opened and closed to desired notched positions without difficulty. In this sense, it is consistent with a "slip-friction adjustment means" as described in Appellants' specification at pages 9 and 10, the relevant portions of which are reproduced herebelow for the Examiner's convenience (with emphasis added).

The friction-type adjustment mechanism 136 and certain others described hereinafter may be suitably referred to as a "slip friction mechanism." As used herein, the term "slip friction mechanism" shall mean an assembly which is derivative of a ratchet and a slip friction disk clutch assembly. It is derivative of a ratchet in

that it is used to progressively tighten the hair gripping portions 122, 124 about a lock or shock of hair as described below. And, it is derivative of a slip friction disk clutch assembly in that the position into which the wearer squeezes the hair gripping portions 122, 124 may be overcome by a rotational force which exceeds the friction force of adjustment mechanism 136, similar to the manner in which a friction clutch slips when the torque applied to the clutch is too great (although, unlike a friction clutch, the various slip friction mechanisms described herein are passive in nature, i.e., they do not serve to drive any parts of the hair holding device). The slip friction mechanisms of the present invention comprise a first surface associated with a first body member (e.g., body member 112), a second surface associated with a second member (e.g., second body member 114), and biasing means for maintaining contact between the first and second surfaces whereby a slip friction interface is created between the first and second surfaces. The shear or friction force generated at the slip friction interface must be sufficient in all instances (regardless of whether a torsion spring or other body member biasing means is present) to cause the body members to remain in the desired hair holding position selected by the user until such time that the user chooses to doff the device by applying a rotational opening force that exceeds the friction or shear force at the slip friction interface.

In stark contrast, page 18, line 14 through page 19, line 8 sharply underscore the distinction between a "slip-friction adjustment means" and a "non-slip-friction adjustment means" (with emphasis added) :

The friction-producing surfaces 394 of lug 320 and 406 of lug 318 are adapted for generating a high degree of shear force when brought into engagement with one another by disengagement means 360. Indeed, the friction-producing surfaces 394 of lug 320 and 406 of lug 318, in cooperation with disengagement means 360 produce a friction-type adjustment mechanism 136 that may be suitably referred to as a "non-slip friction

mechanism." As used herein, the term "non-slip friction mechanism" shall mean an assembly which is derivative of a ratchet and a non-slip friction disk clutch assembly. It is derivative of a ratchet in that it is used to progressively tighten the hair gripping portions 322, 324 about a lock or shock of hair. And, it is derivative of a non-slip friction disk clutch assembly in that the position into which the wearer squeezes the hair gripping portions 322, 324 may not be readily overcome by a rotational force exerted by a user (although, unlike a friction clutch, the various non-slip friction mechanisms described herein are passive in nature, i.e., they do not drive any shaft or other parts of the hair holding device). The non-slip friction mechanisms of the present invention comprise a first surface associated with a first body member (e.g., body member 312), a second surface associated with a second member (e.g., second body member 314), and biasing means for maintaining contact between the first and second surfaces whereby a non-slip friction interface is created between the first and second surfaces. The shear or friction force generated at the non-slip friction interface must be sufficient in all instances to cause the body members to remain in the desired hair holding position selected by the user until such time that the user chooses to doff the device by releasing them using the disengagement means 360 as described below.

Clearly then, the difference between a "slip friction mechanism" and a "non-slip friction mechanism" is that the non-slip friction mechanism requires a separate disengagement means in order to open the hair holding device's body member's whereas the "slip friction mechanism" merely requires reverse physical -- typically not terribly substantial -- rotational force sufficient to overcome the shear force exerted by the slip friction mechanism.

With the foregoing in mind, Appellants again ask: where is non-slip friction mechanism -- as that mechanism is particularly

defined in the present application -- shown or described in Wilde? The Wilde ear ring can be opened and closed to desired notched positions without difficulty. It does not require a separate disengagement means for its release. As such, Wilde clearly does not disclose or suggest the invention defined in Appellants' independent claim 1.

In the **Response to Arguments** section at pages 5 and 6, paragraphs 9 and 10, of the May 28, 2008 Office Action, the Examiner stated the following (with emphasis added) :

9. In response to applicant's arguments, the recitation of a hair holding device has not been given patentable weight because the recitation appears in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purposes of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

10. In response to applicant's argument that the Wilde device is an ear ring and not a hair holding device, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art is capable of performing the intended use, then it meets the claim. Further applicant admits that the device of Wilde "would clamp little more than a few strands of hair", hence being capable of holding hair, applicant has not claimed how much hair is intended to be held, the only limitation is that the device must be capable of clamping hair.

Appellants address these specific contentions below.

First, Appellants kindly direct both the Examiner's and the reviewing members of the Board's attention to the hair holding structure in the body of claim 1 on appeal specifically defining the hair holding device called for in the preamble thereof. See, for example, the first and second body members comprising hair gripping portions adapted to be squeezed by a user whereby said hair gripping portions come into contact with gathered strands of a user's hair. It is these structural "hair gripping portions" of the present hair holding device invention -- in the body of claim 1 -- which saliently distinguish the present invention from the ear ring of Wilde, as elaborated below. Thus, Appellants neither rely nor attempt to rely on the preamble to make this all-important distinction.

Second, the Examiner appears to be suggesting that if the Wilde ear ring could conceivably hold some minuscule amount of hair for an instant or perhaps a few seconds in time it therefore qualifies as a hair holding device as that term is clearly understood within the context of the present invention. That reasoning is flawed on the most basic of levels: it simply ignores the practical fact that the opposed convex "dished ends" 7 and 11 of spring frame "a" and clamping member "b" of the Wilde ear ring, even if they were somehow attempted to be used to clamp a wearer's hair, would clamp little more than a few strands of hair at the centralmost portions of the clamping surfaces. It would fall off those few strands of hair in little time. It simply would not work as a hair holding device. The Examiner as well as the Board knows this. As far as the Examiner's suggestion that Appellant's somehow "quantify" the amount of hair which would -- to the Examiner's satisfaction --

draw a bright line between the Wilde ear ring and the hair holding device of the present invention in order to demarcate their manifest distinctions in structure and function, the Board will surely agree that such a demand is essentially impossible to fulfill. Appellants direct the Board's attention to the disclosures of the present invention and the Wilde patent and trust that the Board will have no difficulty in perceiving the conspicuous structural differences between an ear ring and a hair holding device as well as the inherent inability of the former to effectively function as the latter.

Appellants reiterate that the Wilde device does not in fact satisfy the structural limitations of the presently claimed invention. Once again, the small convex clamping surfaces of spring frame "a" and clamping member "b" of Wilde could not possibly engage enough hair to retain the device on a shock of hair. Consequently, under no reasonable interpretation of the Wilde patent could they be considered to be hair gripping portions of first and second members of a hair holding device. Thus, the Wilde device does not anticipate, suggest or otherwise render obvious the hair holding device defined in Appellants' claim 1.

Accordingly, Appellants kindly submit that the outstanding rejection of claims 1 and 3-6 under 35 U.S.C. 102(b) as being anticipated by Wilde is improper and should be reversed.

(2) Rejection of Claims 1, 3-5 and 9 under
35 U.S.C. § 102(b) as being anticipated by Sheehan

Claims 1, 3-5 and 9 stand twice rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 3,546,750 to Sheehan. Such rejection is respectfully traversed.

The Sheehan device is a one-way gripping device (specifically, a cable tie) for permanently gripping strands, cables, wires and the like (see col. 1, lines 48-52). In fact, the curved arms 22 and 24 of the Sheehan device must be physically severed, thereby destroying the device, in order to remove it from the cables or like members about which it is bound (see col. 3, lines 15-19). The arms 22 and 24 of Sheehan are connected to a one-way ratchet mechanism that prevents reverse rotation of the arms (see col. 1, lines 24-27; col. 3, lines 3-14, lines 20-26 and lines 42-51; and col. 4, lines 1-4). Such a one-way gripping mechanism is the antithesis of the slip friction mechanism particularly recited in Appellants' claim 1 and described in Appellants' specification which purposely does permit reverse rotation of the hair gripping members. Consequently, Sheehan does not anticipate the invention defined in Appellants' claim 1.

In the **Response to Arguments** section at page 5, paragraph 11 of the May 28, 2008 Office Action, the Examiner stated the following in respect to Sheehan (with emphasis added) :

11. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., a two way gripping device) are not recited in the rejected claim(s).

Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Geuns*, 988 F.2d 11811, 26 USPQ2d 1057 (Fed. Cir. 1993). Further Sheehan is a 102 rejection therefore all the structural limitations have been met the fact that applicant states you would have to cut the device of Sheehan in order to remove it is irrelevant since applicant has not claimed that the device is reusable after the device has been removed from the user.

With due respect, Appellants disagree with the Examiner's assertion that the Sheehan device must be cut to effectuate its removal "is irrelevant." It appears the Examiner is intimating that since Appellants' claims, which are already plainly structurally distinguishable from the Sheehan device, do not expressly state that they are not a "Sheehan-type device," then Sheehan anticipates their structure. More specifically, it seems the Examiner is suggesting that the claims of the present application must expressly state that the instant hair holding device is not a one-way gripping device such as in Sheehan, a device which must be destroyed after each use -- an unthinkable impracticality for a reusable hair holding device -- for Appellants' claims to be considered to be distinguishable from the Sheehan device. People simply do not wear cable ties or other permanently fixed devices on their hair. With due respect, any fair and reasonable reading of Appellants' specification and the Sheehan patent clearly belies this fallacy.

Accordingly, reversal of the outstanding section 102(b) rejection of claim 1 and its dependent claims 3-5 and 9 in reliance upon Sheehan is respectfully requested.

Lastly, in the **Response to Amendment** section at page 4, paragraph 5, 6 and 7 of the May 28, 2008 Office Action, the Examiner stated the following in respect to the 37 CFR § 1.132 declarations of Ms. Rommy Revson and Ms. Mary LaFauci, which declarations were originally submitted in a Submission After Final Office Action dated December 18, 2007 prior to the February 22, 2008 Request for Continued Examination (RCE) of the present application and which were resubmitted with the RCE (with emphasis added) :

5. The declarations under 37 CFR 1.132 filed February 26, 2008 are insufficient to overcome the rejection of claims 1, 3-6 and 9 based on the 102(b) rejections of Wilde and Sheehan as set forth in the last Office action because:

6. The declarations of Mary LaFauci and Rommy Revson states that the claimed subject matter solved a problem that was long standing in the art. However, there is no showing that others of ordinary skill in the art were working on the problem and if so, for how long. In addition, there is no evidence that if persons skilled in the art who were presumably working on the problem knew of the teachings of the above cited references, they would still be unable to solve the problem. See MPEP § 716.04

7. Further the declarations of Mary LaFauci and Rommy Revson refer only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate with the scope with the claims. See MPEP § 716.

At the outset, Ms. Rommy Revson and Ms. Mary LaFauci are persons of extraordinary if not unparalleled skill in the subject art. Their declarations -- although unnecessary to support patentability since, as noted above, Appellants' device

is neither anticipated nor rendered obvious by Wilde or Sheehan -- make it indisputably clear that the invention defined in Appellants' claims prescribes a hair holding device that effectively eliminates the well-known and long-standing problem of slippage associated with spring biased hair clip devices which, prior to Appellants' invention, has not been solved by the prior art.

As Ms. Revson and Ms. Lafauci unequivocally aver, they recognized but repeatedly tried and failed to solve the same long-standing problem addressed and solved by Appellants. *Markman v. Lehman*, 987 F. Supp. 25, 43, 45 USPQ2d 1385, 1399 (d. D.C. 1997), *aff'd*, 178 F.3d 1306 (Fed. Cir. 1998) (unpublished) ("Establishing a long-felt need requires a showing that others skilled in the art in fact perceived a need and that this perception persisted over a long period of time without resolution by the prior art")

The Examiner's statement: "However, there is no showing that others of ordinary skill in the art were working on the problem and if so, for how long." in Paragraph 6 is mystifying. In their declarations, Ms. Revson and Ms. Lafauci rightly testified to their own unsuccessful efforts to solve the problem solved by Appellants. They were describing their own personal experiences -- which is the sort of content one would normally expect in a Section 132 declaration. Parsing the Examiner's veiled new evidentiary "barrier" for what it is, Appellants query: what number of other persons whose failed efforts to solve the problem would Appellants have to produce to satisfy the Examiner: 2, 10, 100, more? And, of that arbitrary, undefined and surely unknowable number, there is the further

undefined issue of how long that person or those persons tried and failed to solve the problem? What amount of time would be sufficient to convince the Examiner of the novelty and nonobviousness of Appellants' claimed invention: months, a year, 5 years 10 years, longer? Moreover, it is not clear whether it is Appellants or Ms. Revson and Ms. Lafauci that the Examiner expects to be possessed of such unknowable information.

Further along on Paragraph 6, the Examiner makes another fantastic statement: "*In addition, there is no evidence that if persons skilled in the art who were presumably working on the problem knew of the teachings of the above cited references, they would still be unable to solve the problem.* Initially, Appellants query: where and how does the Examiner expect Appellants to locate such evidence. To venture an answer, it seemingly appears that the Examiner is requiring Appellants to do so through Section 132 Declarations of Ms. Revson and Ms. Lafauci. Appellants believe the Board will agree that, if asked, neither Ms. Revson nor Ms. Lafauci could unequivocally state that *if persons skilled in the art who were presumably working on the problem knew of the teachings of the above cited references, they would still be unable to solve the problem.* And, if they could not make such a statement, would that non-answer -- based on Ms. Revson and Ms. Lafauci not being able to comment to an absolute certainty on hypothetical suppositions and the unknowable thoughts of third parties -- render the presently claimed invention unpatentable?

Paragraph 6 places Appellants in a pit of illogic from which no one can escape. Appellants trust the Board will agree that in Paragraph 6 the Examiner has burdened Appellants with an

arbitrary and unattainable burden of proof. Therefore, Appellants entreat the Board to deem for the record such burden of proof unsustainable as a matter of law.

Applicant Bruce Rogers is the inventor of U.S. Patent No. 6,276,369 for HAIR BAND SYSTEM WITH STORAGE AND DISPLAY DEVICE. Assuming the level of ordinary skill in the instant art to be, at the lowest, a typical consumer of hair fashion products, or at the highest, a hairdresser, fashion designer or the like (either of whom does not hold a patent, has not filed a patent application or has not published articles related to the presently disclosed and claimed technology), then at least Applicant Bruce A. Rogers should be considered to be a person of "extraordinary skill in the art" against which a legal assessment of what might be considered obvious to a hypothetical person of "ordinary skill in the art" simply does not apply.

However, if Applicant Rogers is presumed to be of "ordinary skill in the art," and the level of "ordinary skill in the art" is to be presumed to that of one who holds a patent or has filed a patent application or has published articles relating to the presently disclosed and claimed technology, then Appellants' invention is still unobvious because others of this elevated "ordinary skill in the art", i.e., multiple patent holders Ms. Revson and Ms. Lafauci -- whose inventions have experienced tremendous commercial success -- have repeatedly tried and failed to satisfy the long-felt need successfully addressed by Appellants prior to Appellants' invention.

In short, Appellants earnestly believe that, through submission of the Declarations of Ms. Revson and Ms. Lafauci,

Appellants have offered (1) more than ample "objective evidence" that persons of far more than ordinary skill in the art were working on the problem for a long period of time without solution; (2) Ms. Revson's indication that her efforts have been repeated and reach back to the 1980s and Ms. Lafauci's indication that hers have been over the course of several years; and (3) as incorrectly stated by the Examiner in Paragraph 7, both Ms. Revson's and Ms. Lafauci's declarations that specifically provide objective evidence of nonobviousness which is commensurate in scope with the claims:

13. Based on my review of the '846 application, I believe that a hair holding device constructed in accordance with the hair holding device as claimed in independent claim 1 of the '846 application, in particular -- a hair holding device having first and second body members pivotally connected via hinge means, and a slip friction adjustment means -- would produce a hair holding device whose hair gripping portions would firmly engage and not slip or fall from a shock of hair, and therefore would solve the long-standing and notorious slippage problem associated with conventional spring-biased hair clips described in paragraph 10.

Revson Declaration at Paragraph 13.

9. Based on my review of the '846 application, I believe that a hair holding device constructed in accordance with the hair holding device as claimed in independent claim 1 of the '846 application would produce a hair holding device able not only to increase the coefficient of friction among the individual strands comprising gathered hair but also to increase the coefficient of friction between the surface of the invention and the surface of hair. As a result, the invention's hair gripping portions would solve not just one, but both, of the long-standing slippage problems described in Paragraph 7.

Lafauci Declaration at Paragraph 9.

Lastly, although to this point they have been wrongly dismissed, as a matter of law the declarations of Ms. Revson and Ms. Lafauci cannot be capriciously ignored by the Examiner. "When a patent applicant puts forth rebuttal evidence, the Board [of Appeals] must consider that evidence." 498 F.3d 1345, 1351 (Fed. Cir. 2007) (emphasis added).

Appellants' invention satisfies a long-felt need that even those of extraordinary skill in the subject art could not fill prior to Appellants' solution. In this regard, the Declarations of Ms. Revson and Ms. Lafauci could not speak more forcefully and articulately to the nonobviousness of Appellants' invention.

To conclude, Appellant's claims must be interpreted fairly and accurately. Additionally, the teachings of the prior art cited against the claims on appeal must be fairly and accurately interpreted for what they in fact disclose and/or suggest. The disclosures of the cited references, when so interpreted, do not disclose or suggest Appellants' claimed invention. Particularly in light of Ms. Revson's and Ms. Lafauci's Declarations, the invention as a whole would not have been considered obvious to one skilled in this art at the time of Appellant's invention. Accordingly, it is respectfully submitted that the Final Rejection of claims 1 and 3-6 and 9 should be reversed.

Respectfully submitted,

BRUCE A. ROGERS, ET AL.

Date: August 13, 2008


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VIII. APPENDIX

The claims on appeal are as follows:

1. A hair holding device comprising:

a first body member and a second body member, said first and second body members comprising hair gripping portions adapted to be squeezed by a user whereby said hair gripping portions come into contact with gathered strands of a user's hair;

hinge means for pivotally connecting said first and second body members; and

adjustment means comprising a non-slip friction mechanism coaxially arranged with respect to said hinge means for causing said hair gripping portions to remain at a point at which said hair gripping portions are squeezed together by a user.

3. The hair holding device of claim 1 wherein said non-slip friction mechanism comprises a first irregular surface associated with said first body member, a second irregular surface associated with said second body member, and biasing means for maintaining contact between said first and second irregular surfaces such that a non-slip friction interface is created between said first and second surfaces.

4. The hair holding device of claim 3 wherein said non-slip friction interface extends perpendicular to said hinge means.

5. The hair holding device of claim 3 wherein said first and second irregular surfaces are mating toothed surfaces.

6. The hair holding device of claim 3 wherein said biasing means comprise a tension spring having a first end in contact with said first body member and a second end in contact with said second body member for biasing said hair gripping portions into a predetermined position.

9. The hair holding device of claim 3 wherein at least one of said irregular surfaces is provided on at least one insert carried by at least one of said first and second body members.

IX. EVIDENCE APPENDIX

NONE.

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X. RELATED PROCEEDINGS APPENDIX

NONE.

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